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IN THE

Supreme Court of the United States

October Term, 1956

No. 489

VAN CURLER BROADCASTING CORPORATION, *Petitioner*,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND HUDSON VALLEY BROADCASTING CO., INC., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Federal Communications Commission appears at page 94 of the Joint Appendix (R. 948). The opinion of the Court of Appeals sitting *en banc* has not yet been reported. It is attached as

an appendix to this brief together with an earlier opinion of a panel of the Court of Appeals on motions for stay.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Do the procedural safeguards provided in the case of public rule making in Section 4 of the Administrative Procedure Act prohibit secret intervention by, and *in camera* arguments from, interested persons who have not made their appearance in the public proceedings held pursuant to the Section before the Federal Communications Commission?

2. Are rule-making proceedings under Section 4 of the Administrative Procedure Act subject to the rule of *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327, so that the Federal Communications Commission may not grant the rule-making proposal of one party while at the same time postponing consideration of the mutually exclusive counter-proposal of another party?

3. Does the Commission comply with the provisions of Section 4 of the Administrative Procedure Act which require a statement of the "basis and purpose" of a new rule when it promulgates a rule with a general statement which makes no reference to the issue posed by the Commission in ordering rule making, and which gives no indication of the specific statutory basis for the new rule?

STATUTES INVOLVED

1. *Administrative Procedure Act:*

Section 4(b):

"(b) *Procedures.*—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. . . ." [15 U.S.C. § 1003, 60 Stat. 238 (1946)].

2. *Communications Act of 1934, as amended:*

Section 303(g):

"[The Commission shall:] Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;". [47 U.S.C. § 303(g), 48 Stat. 1082 (1934)].

Section 307(b):

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." [47 U.S.C. § 307(b), 49 Stat. 1475 (1936)]

STATEMENT

This case involves rule-making proceedings which led to the allocation by the Federal Communications Commission of a VHF[1] television channel to Vail Mills, New York, a small community near the three large cities, Albany, Schenectady and Troy. At the time these proceedings began, the area was predominantly UHF.[1] In Albany, Schenectady and Troy and neighboring cities, there were one VHF channel and seven UHF channels. In operation were one VHF station and three UHF stations.

The proceedings were begun by a request by respondent Hudson Valley Broadcasting Company that the Commission allocate a second VHF channel to the area. This request came in the form of a petition requesting the institution of rule-making proceedings to amend Section 3.606 of the Commission's Rules and Regulations by allocating VHF channel 10 to Vail Mills, New York, a crossroads community of 250 people about 20 miles northwest of Schenectady (R. 1-2, 9, 41). This type of allocation change is known as a "drop in" in the trade because a new channel is "dropped into" an area. Hudson

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[1] The VHF channels (very high frequency—Channels 2-13) are lower in frequency, provide somewhat greater coverage, and have been in use longer for television broadcasting, than the UHF channels (ultra high frequency—Channels 14-83). For a number of reasons, the newer UHF stations have been unable to compete successfully with the older VHF stations in many areas, particularly where there are two or more VHF stations in operation. A year and one-half ago the Commission said: "The failure of UHF to become integrated with VHF is manifested by the fact that of 318 UHF stations authorized by the Commission, only one-third are presently in operation." (Preliminary Report of FCC to Senate Interstate and Foreign Commerce Committee re VHF-UHF and Television Network Problems, March 18, 1955).

Valley, the operator of one of the three existing UHF stations, proposed to apply for the VHF channel for its station because it was having serious financial difficulties in operating a UHF station in competition with the one VHF station (R. 357-58).

Petitioner and Greylock Broadcasting Company, both of which operated UHF stations in the area, opposed the plan on the ground that experience in other communities across the country showed that no UHF station could be operated successfully in competition with two VHF stations. The necessary consequence of allocating Channel 10 would be, they argued, to reduce the number of operating commercial stations from four (1 VHF plus 3 UHF) to two (2 VHF) and the potentiality from eight (1 VHF plus 7 UHF) to two (R. 385, 12-17, 50-53, 209-215). Petitioner recommended, as a counterproposal to the Channel 10 "drop in", that all the commercial allocations in the area be made UHF so that all stations would be placed on equal competitive footing and the maximum number of stations provided (R. 20, 29). This type of reallocation is called "deintermixture" in the trade because it eliminates the "intermixture" of UHF and VHF commercial channels in the same area.

The day before Hudson Valley's request to allocate Channel 10 was filed, the Commission granted its consent to the transfer of control of Hudson Valley to a group headed by Lowell Thomas, a commentator for the Columbia Broadcasting System (CBS). Petitioner protested against this transfer on the ground that CBS would favor Lowell Thomas and give the CBS affiliation then held by petitioner to Hudson Valley (R. 469-472, 934). Petitioner charged that the affiliation shift, which subsequently occurred, and the Chan-

nel 10 proposal, which CBS later secretly supported, were both part of a conspiracy between CBS and the Lowell Thomas group to drive petitioner out of business and make Albany-Schenectady-Troy a two-station market (R. 472, 934).

The Commission's first action was to issue a "Notice of Proposed Rule Making" requesting comments from "interested parties" by a specified date on both the Channel 10 proposal and petitioner's counterproposal (R. 58). Comments were filed by several parties including petitioner and Hudson Valley but not CBS (R. 67, 81, 206, 218).

Later the Commission issued another such notice (R. 308). It requested that the parties submit further information on, *inter alia,* the chances for successful operation of existing and potential UHF stations in the area if Channel 10 were allocated or, in the alternative, if petitioner's deintermixture counterproposal were adopted (R. 313-314). The notice established dates for the filing of comments and replies and prohibited later filings unless the Commission specifically asked for them or good cause was shown (R. 314). The Commission then scheduled oral argument for parties "who have heretofore filed timely written comments" (R. 476). It required all parties desiring to participate to file an appearance by a specified date (*Ibid.*). Comments and appearances were filed by several parties but not CBS. At the oral argument, which was open to the public, CBS did not appear. After the argument, the matter was submitted.

Several months later an article appeared in a leading trade publication stating that the Commission had just held "an unprecedented 2½ hours meeting" con-

cerning television channel allocations with the president of CBS and his aides (R. 929). Petitioner promptly filed a petition to reopen the proceedings so that it could find out precisely what CBS had said and could reply to the CBS arguments (R. 922). Petitioner alleged, upon information and belief, that CBS had opposed each of petitioner's recommendations at the *in camera* meeting; that CBS had urged the abandonment of any attempt to utilize the UHF allocations in the area; that it had opposed petitioner's deintermixture plan; and that it had supported the allocation of Channel 10 to the area—the allocation proposed by the Lowell Thomas group. (R. 930, 932-33). Petitioner requested that the record be reopened in order that it might ascertain exactly what CBS had presented to the Commission, and in order that it might rebut the CBS presentation (R. 935-36).

The Commission, however, not only denied this request but, by a vote of 4 to 3, allocated Channel 10 as requested by CBS and the Lowell Thomas group (R. 948, 954-55, 956). On November 10, 1955, it adopted the Report and Order from which appeal was taken to the court below. With respect to Channel 10, the Commission concluded (R. 954):

> "Hudson Valley requests the assignment of a new channel, Channel 10, to Vail Mills, a small community located in the Albany-Schenectady-Troy area, about 20 miles northwest of Schenectady. The Hudson Valley proposal comports with the Commission's present television allocation plan and rules. Unlike the proposals for deintermixture, the petition to assign Channel 10 to Vail Mills is consistent with the rules and principles of our present television allocations established in the Sixth Report and Order. Channel 10 would meet the present minimum spacing requirements

and all other standards.[3] Until a decision has been reached on possible amendments to our present allocation, the Commission believes that it would not be justified in withholding action, pursuant to our present allocation plan and rules, that would bring additional television service to a significant number of people. Refusing to make use of this valuable VHF frequency as contemplated by the present rules would, we believe, be a waste of valuable spectrum space for which active demand is indicated. Channel 10 in Vail Mills will represent a second television service to an appreciable percentage of families residing in the area, as well as a first service to a significant number of families. We do not believe that we would be justified in withholding this service, which can be afforded under our present rules even though we are presently considering possible amendments to our allocations. Accordingly, we are amending our rules to add the assignment of Channel 10 to Vail Mills.

"[3] It is noted that Vail Mills does not have a postoffice. A postoffice, however, is not a prerequisite to the assignment of a television channel. . . ."

With this general language and with no reference to the main argument of the opponents of Channel 10—that the total stations in the area would be reduced to two—the Commission allocated the channel. At the same time, it denied—without prejudice to later resubmission—over 40 other requests for changes in its allocation plan, including Van Curler's deintermixture proposal, on the ground that such requests must await the conclusion of further rule-making proceedings looking toward major changes in the Commission's allocation policies (R. 953-54; see also *Memorandum Opinion and Order* adopted November 10, 1955, 13 Pike & Fischer Radio Reg., p. 1522). Many of the

proposals postponed were of striking similarity to the Vail Mills action.[1] But Channel 10 was the only allocation plan of the many considered which received favorable action.

With respect to the CBS *ex parte* intervention, the Commission admitted that it had "knowledge" of the "general suggestions informally submitted to us" (R. 955). Commissioner Hyde, dissenting stated that material "*de hors* the record had been considered . . ." (R. 957). According to him, parties to the proceeding had "not had a fair opportunity to be apprised of the existence of such material, let alone meet or test the validity thereof." (*Ibid.*)

Commissioner Bartley, dissenting, referred to the Channel 10 allocation as a "slug-in" (R. 959). This expression was a novel modification of the phrase "drop in" which had frequently been used in the trade before to describe the placement of a new channel in

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[1] *E.g.*, Winnebago Television Corp., a UHF permittee in Rockford, Illinois, asked that Channel 3, presently allocated to Madison, Wisconsin, be "dropped into" Orangeville, Illinois, to serve Rockford, so that Winnebago could apply for it. The result of the plan would have been to give the Rockford area two commercial VHF channels instead of one VHF and one UHF. Final action on the merits of this plan was postponed (R. 949-50, 953-54). See also, Plains Television Corp.'s request to allocate a VHF channel in Illopolis, Ill., to serve Springfield (R. 948-49, 953-54); Channel 16 of Rhode Island's request to allocate a VHF channel to Westerly, Rhode Island, in order to serve Providence (R. 950, 953-54); South Central Broadcasting Corp.'s request that a VHF channel be allocated to Knoxville, Tenn. and Columbia, S. C. (*Memorandum Opinion and Order* adopted Nov. 10, 1955, 13 Pike & Fischer Radio Reg. 1522); Bakersfield Broadcasting Co.'s request that a VHF channel be allocated to Bakersfield, Cal. (*Ibid.*); Supreme Broadcasting Co., Inc.'s request that a VHF channel be allocated to New Orleans (*Ibid.*)

an area by allocation. Commissioner Bartley apparently meant that brute force had been used to allocate the channel. He also stated that channel 10 would "be the death knell of multiple UHF services in the area; consequently, less instead of more service to the public" (Ibid.).

Commissioner Webster, who concurred with the majority on the postponement of consideration of the deintermixture requests, did not do so on Channel 10 because that action was "so obviously inconsistent" with the postponement (R. 960).

Van Curler petitioned the court below for review of the Commission's order allocating Channel 10, its order denying Van Curler's deintermixture proposal, and its order denying a reopening of the record. The jurisdictional bases for the petition for review were Section 402(a) of the Communications Act of 1934, as amended [47 U.S.C. § 402(a)], Section 4 of the Judicial Review Act of 1950 [5 U.S.C. § 1034] and Section 10 of the Administrative Procedure Act [5 U.S.C. § 1009]. See *United States* v. *Storer Broadcasting Company,* U.S. , 76 S. Ct. 763. The court below, after consideration *en banc,* affirmed the Commission's actions. The opinions of Judge Prettyman for the majority, and of Judge Bazelon for himself and Judge Edgerton dissenting, appear in the appendix.

REASONS FOR GRANTING THE WRIT

This case presents three novel questions which are important to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act [5 U.S.C. § 1003]. The issue basic to each of these questions is the extent to which

Section 4 makes applicable to rule-making proceedings standards of fairness which this Court has repeatedly held must be followed in adjudicatory hearings.

For the protection of interested parties and the public, Section 4 established certain basic essentials for "public" rule-making including (1) public notice of proposed new rules; (2) a right of public participation in the proceedings through submission of "written data, views or argument"; (3) a requirement that the agency consider all relevant matter so presented; and (4) a further requirement that the agency give a statement of the "basis and purpose" of each new rule issued. These basic essentials are particularly important where, as here, a rule-making decision can have the effect of destroying an existing business concern. In the present case, the Commission purported to comply fully with the requirements of the Administrative Procedure Act. By formal notice it instituted the "public" rule-making procedure outlined in Section 4. It permitted interested parties an opportunity to submit written comments, and it established a cut-off date for such filings. It afforded oral argument, and it stated that only parties of record could participate. Then, long after the case was submitted, it gave CBS, an outsider to the proceedings up to that date, the opportunity to file secret comments and make an *ex parte* argument. It made a ruling in favor of the position urged by CBS while at the same time postponing consideration of another pending rule-making proposal which, because it was inconsistent with the CBS proposals, could not be granted at a later date without a reversal of the action taken on the CBS proposals. To cap the climax, it ignored the principal economic problems which it had posed as an issue in the rule-making and to which all parties had directed their

comments. Instead, it issued a general statement that its action would, by providing for a future television station in Vail Mills, a community of 250 persons, "bring additional television service to a significant number of people" (R. 954).

The issues in this case are of substantial importance not only in the television industry but also in the general administration of the Administrative Procedure Act. The issues so impressed the Court of Appeals that it heard argument *en banc* on its own motion. The issues divided the Court of Appeals 7-2. The Commission itself was divided 4-3 on putting in Channel 10. Moreover, by a second 4-3 vote, the Commission has since proposed to take Channel 10 out again.[1]

The decision of the court below constitutes a ruling that the provisions of Section 4 of the Administrative Procedure Act do not impose upon administrative agencies promulgating rules the most rudimentary requirements of fairness applicable in adjudicatory proceedings. The Court of Appeals for the District of Columbia Circuit is the principal court to which problems of administrative procedure are presented. An important pronouncement by that court *en banc* which relieves administrative agencies of compliance with standards of fairness is clearly a proper subject of review by this Court.

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[1] On June 26, 1956, the Commission adopted a second report on deintermixture which proposes, for industry comments, to eliminate one of two VHF channels in those predominantly UHF areas where one VHF station is in operation and a second VHF channel has been allocated but the second station has not yet been constructed. By a 4-3 vote the Commission proposes to follow this formula in the Albany area and delete Channel 10. Whether and when the Commission will take final action on this tentative proposal is unknown. *In re Amendment of Part 3 of the Commission's Rules and Regulations Governing Television Broadcast Stations,* 13 Pike & Fischer Radio Reg., pp. 1571, 1583.

Question 1

The first of the questions presented by petitioner is whether, in a public rule-making proceeding where participation by interested parties is limited to those who have filed appearances, an agency may, without notice to these parties, permit secret intervention and afford *in camera* argument to other parties. The decision of the court below upholds such a procedure. It sanctions the Commission's *ex parte* conference with CBS in violation of the procedural ground rules established by the Commission itself for this very case.

1. The decision below is important first because it authorizes the substantial nullification of the new right of public participation in rule-making proceedings established by Section 4(b) of the Administrative Procedure Act. Section 4(b) created, for interested parties, a right to "an opportunity to participate" in rule making "through submission of written data, views or argument." [5 U.S.C. § 1003(b)]. Congress intended, in enacting Section 4(b), to erect procedural safeguards around the administrative rule-making process which did not surround the legislative process because of the substantial differences between administrative rule making and legislative statute making.[1]

Section 4(b) guarantees that parties to rule-making proceedings shall have, at a minimum, a right to submit evidence in writing. Just as a right to a hearing is meaningless if the judgment is based upon secret

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[1] *Administrative Procedure Act, Legislative History*, Sen. Doc. 248, 79th Cong., pp. 19-20 (1946). For a pre-Administrative Procedure Act rule-making case requiring only "legislative" safeguards, see *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294.

evidence presented during *ex parte* argument, so the right to file a written statement is nugatory if the decision is founded upon hidden data submitted at an *in camera* meeting. The right to file a written statement "includes the right to file a meaningful statement, one based on all the facts in the file and made with awareness of the recommendations and arguments to be countered." *Gonzales* v. *United States,* 348 U.S. 407, 415. Except for the fact that *Gonzales* involved adjudication and not rule-making, its holding would be in direct conflict with the decision below.

2. The decision of the court below is important secondly because it sanctions an agency's non-observance of its own procedural ground rules. In so doing, the decision departs from precedents established by this Court in cases involving adjudication. *E.g., U. S. ex rel. Bilokumsky* v. *Tod,* 263 U.S. 149, 155; *Bridges* v. *Wixon,* 326 U.S. 135; *United States ex rel. Accardi* v. *Shaughnessy,* 347 U.S. 260, 265, 268. These cases hold that properly issued procedural regulations have the "force and effect of law" (*Accardi, supra*); that a person subject to the administrative process "is legally entitled to insist upon the observance of rules promulgated by the . . . [agency] pursuant to law" (*Bilokumsky, supra*); and that such a person must be "afforded that due process required by the regulations in such proceedings" (*Accardi, supra*).

The Commission failed to meet these requirements. Having embarked upon a formal procedure in which the views of all parties were required to be placed upon the public record, the Commission was bound by that procedure, at least until public notice of a different procedure was given. Having closed the record as far as the parties were concerned, the Commission could not secretly open it for CBS. To do so was to violate

its own precedural orders and to do violence to fundamental notions of fair play.

3. The court below upheld this procedure because it found that CBS' "calls and conversations were in regard to the nationwide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nationwide rule-making proceeding to deal with intermixture" (App. p. 5a). This finding was based upon statements in the Commission's opinion indicating that CBS' comments "related to possible national reallocation schemes" and that they did not "pertain to the merits of granting or denying the particular petitions before us, except as part of . . . a nationwide approach" (R. 955). But petitioner had alleged, and the Commission has never denied, that CBS opposed each of petitioner's specific proposals for Albany-Troy-Schenectady at this "unprecedented" two-and-one-half hour, *in camera* meeting with the Commission (R. 929, 930, 933). If this was so, it was clearly incorrect to say that the CBS proposals did not "pertain to" the Channel 10 petition or petitioner's counter-proposal. Whether or not the CBS presentation also pertained to some other proceeding, as the Commission stated and the Court of Appeals thought, seems irrelevant. Van Curler was prejudiced in any event.

The Commission's own opinion acknowledges that *ex parte* representations were in fact made to it (R. 955). Commissioner Hyde, dissenting, stated that material "*de hors* the record, *had been considered.* . . . [T]o the extent that information outside of the record played a part in the majority decision, the participants in the formal proceedings have not had a fair opportunity to be apprised of the existence of such material,

let alone meet or test the validity thereof." (R. 957, emphasis added). It thus seems clear that the CBS comments were considered and did have an effect on the proceedings. The extent of that effect is best judged by the inconsistency of the Commission's actions involving Vail Mills and Albany with its simultaneous actions involving other areas. (See pp. 8-9, *supra*)

The Commission's procedure quite clearly did violence to fundamental notions of fair play, as well as to its own procedural ground rules and Section 4(b) of the Administrative Procedure Act. If the question were not novel because rule-making and not adjudication is involved, the sanction to this procedure given by the court below would call for an exercise by this Court of its power of supervision. In any event, the matter is of obvious importance.

Question 2

The second question presented by this petition is also of importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act. The question is whether an agency may grant the rule-making proposal of one party while, at the same time, postponing consideration of the merits of the mutually exclusive counter-proposal of another party. In this case, the Commission granted Hudson Valley's petition to allocate VHF Channel 10 while postponing consideration of the merits of petitioner's request to "deintermix" the area by eliminating all the VHF allocations and placing all commercial stations on competitively equal UHF channels.

This Court's *Ashbacker* decision [*Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327] stands for the proposition that, in an adjudicatory proceeding, it is unfair to postpone consideration of one application for a new

station while at the same time granting a mutually exclusive application. *Ashbacker* holds that where there are inconsistent proposals, it is arbitrary to grant one and then impose upon the other the burden of justifying the displacement of the first. This rule of concurrent consideration is based upon the idea that an agency which has decided an issue one way before hearing the contentions of the other side cannot give that side a really fair hearing on the issue at a later date because its mind has already been made up.

The issue presented by this petition is whether such a rule of elemental fairness is applicable to rule-making proceedings as well as to adjudicatory ones. The majority decision below does not discuss the point. It is however the principal argument of the two dissenters, Judges Edgerton and Bazelon. Moreover, the Commission itself has recognized the principle in other cases. For example, when it recently considered three rule-making petitions involving inconsistent proposals for channel reallocations, the Commission stated that "the three petitions are therefore mutually exclusive and *must* be considered together".[1]

This is an important question of federal law which has not been, but should be, settled by this Court.

Question 3

The third of the questions presented by this petition is also one which looms large in the interpretation of the rule-making provisions of the Administrative Procedure Act. It involves the requirement of Section 4(b) of that Act that an agency give a "concise general statement" of the "basis and purpose" of a rule

[1] *In re Amendment of Section 3.606, Table of Assignments, Rules Governing Television Broadcast Stations* (York, Lancaster, etc., Pennsylvania), Notice of Further Proposed Rule Making released July 23, 1956 in FCC Do. No. 11499 (emphasis added).

when it is promulgated. The court below found this requirement satisfied by vague generalities which indicated little more than that a majority of the Commission thought that the allocation of Channel 10 would provide "additional television service to a significant number of people" (R. 954). Absent was a conclusion in the language of any pertinent Communications Act standard. Absent was an indication as to which of several such standards governed this case. Absent was a determination of the basic factual question which the Commission itself had asked during the proceedings: whether the allocation of a VHF channel would prevent or hinder the ultimate utilization of the UHF channels already allocated. Indeed, the Commission's opinion does not even contain a conclusion that the public interest would be served by its action.

Whether such a statement meets the test of Section 4(b) of the Administrative Procedure Act is clearly of paramount importance to all agencies exercising rule-making powers under that Act. If a rule can be promulgated with the simple statement that a "significant number of people" would be served by its promulgation—without language showing that the pertinent test of the agency's statute has been met and without a resolution of the basic factual issues upon which the agency requested comments—then the agency's job of justifying its action becomes immeasurably easier, and the Court's job of reviewing that action becomes immeasurably more difficult. Judging by the legislative history which we will set forth in a moment, such a result was not intended by Congress when it enacted the Administrative Procedure Act.[1]

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[1] *Cf. Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-91, followed in *Radio Corp. of America* v. *United States*, 341 U.S. 412, 414-415, 420.

Nor would it seem to follow from this Court's interpretation of similar statutory provisions. *E.g., United States* v. *Baltimore & O. R. Co.,* 293 U.S. 454, discussed *infra.*

1. The legislative history is clear that more is required by Section 4(b) than the ultimate conclusion that a significant number of people will be served by the issuance of a rule. The Senate Judiciary Committee Print of June 1945 which contained the relevant language of Section 4(b) had this to say by way of explanation[1] (emphasis added):

> "The statement of the 'basis and purpose' of rules issued will vary with the rule, but in any case should be *fully explanatory* of the *complete factual and legal basis* as well as the real object or objects sought."

The later Report of the House Committee on the Judiciary is to the same effect[2] (emphasis added):

> "The agency must keep a record and analyze and consider all relevant matter presented prior to the issuance of rules. The required statement of the basis and purpose of rules issued should not only *relate to the data so presented* but *with reasonable fullness explain the actual basis and objectives* of the rule."

The Congress thus intended that "basis and purpose" mean, at a minimum, a "fully explanatory" statement giving factual conclusions which relate to the relevant data presented by interested parties and

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[1] Administrative Procedure Act, Legislative History, Sen. Doc. 248, 79th Cong., 2d Sess., p. 20 (1946).

[2] *Id.* at p. 259. The Senate Committee report is almost identical to the House Report. *Id.* at p. 201.

legal conclusions which relate to the statutory bases for agency action.

2. This is no more than this Court has required of agencies promulgating rules under comparable statutes prior to the enactment of the Administrative Procedure Act. Typical of such decisions is the *B & O* case.[1] There the Court had before it an Interstate Commerce Commission order requiring railroads to equip locomotives with power-operated reverse gear. The relevant statute authorized the ICC to issue orders requiring equipment changes to remove "unnecessary peril to life and limb."

Finding the ICC's discussion of this statutory test ambiguous, Mr. Justice Brandeis, for a unanimous court, stated (293 U.S. at 463-65):

> "[W]hether the use of any or all types of steam locomotives 'equipped with hand reverse gear as compared with power reverse gear causes unnecessary peril to life or limb' is left entirely to inference. This complete absence of 'the basic or essential findings required to support the Commission's order' renders it void. . . .
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> It is true that formal and precise findings are not required under section 14(1) of the Interstate Commerce Act (49 USCA § 14 (1)), which declares that the report 'shall state the conclusions of the commission, together with its decision.' . . .

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[1] *United States* v. *Baltimore & O. R. Co.*, 293 U.S. 454; see also *Thomas Paper Stock Co.* v. *Porter*, 328 U.S. 50. The doctrine of the *B. & O.* case has been reaffirmed in numerous decisions. See, e.g., *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475; *City of Yonkers* v. *United States*, 320 U.S. 685; *Colorado-Wyoming Gas Co.* v. *F.P.C.*, 324 U.S. 626; *Secretary of Agriculture* v. *United States*, ... U.S. ...., 76 S. Ct. 244.

> That provision relieves the Commission from making comprehensive findings of fact. . . . But section 14(1) does not remove the necessity of making, where orders are subject to judicial review, quasi jurisdictional findings essential to their constitutional or statutory validity.'"[1]

3. With these general principles in mind, let us turn again to the situation at hand. As the court below recognized, the relevant statutory criteria in this case and the probable legal bases for the Commission's allocation were one or both of two sections of the Communications Act, Sections 307(b) and 303(g). Section 307(b) directs the Commission, in allocating "frequencies," to "provide a fair, efficient and equitable distribution of radio service" among the several states and communities of the nation. Section 303(g) requires that the Commission "encourage the larger and more effective use of radio in the public interest."

Nowhere in its opinion does the Commission state whether either or both of these tests have, in its judg-

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[1] The principle enunciated in the *B. & O.* case, *supra,* received general statement in both of the later *Chenery* cases:

> ". . . [T]he courts cannot exercise their duty of review unless they are advised of the consideration underlying the action under review . . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted *be clearly disclosed and adequately sustained.*" *SEC* v. *Chenery Corp.,* 318 U.S. 80, 94 (emphasis added).
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> "If the administrative action is to be tested by the *basis* upon which it purports to rest, *that basis must be set forth with such clarity as to be understandable.* It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196-197 (emphasis added).

ment, been satisfied. That there was substantial doubt that either test would be served by the allocation is clear. Petitioner contended, and submitted evidence to support its contention, that the allocation of a VHF channel would preclude the utilization of various UHF channels which the Commission had previously allocated to Albany, Schenectady, Troy, Gloversville, Amsterdam, Glens Falls, New York; and to Adams, Massachusetts (R. 385, 430, 432-33, 12-17, 218-19). If this were so, Gloversville, Glens Falls, Amsterdam and Adams would never be able to have any television station of their own because UHF channels were the only kind that they were allocated. Thus they would not receive the "equitable distribution of radio service" promised them by Section 307(b). And, the larger cities, Albany, Schenectady and Troy, would have fewer stations and therefore a less equitable distribution. Moreover, if the allocation actually resulted in fewer rather than more stations, the Commission's action would certainly not "encourage the larger and more effective use of radio in the public interest" as required by Section 303(g).

That the allocation of a VHF channel to the area would destroy all opportunity for successful operation of UHF stations was petitioner's principal argument to the Commission (R. 12-17, 218-19, 385). The Commission itself recognized the danger in its rule-making notice by requesting factual information from the parties concerning the effect of the allocation of a VHF channel on the present and potential UHF stations (R. 313-14). Even Hudson Valley, the proponent of Channel 10, admitted that the "maximum number of competing stations would result" if there were no VHF allocations in the area (R. 358).

So far as can be seen from the Commission's opinion, these matters were never considered or resolved. The full text of that part of the opinion which concerns the allocation of Channel 10 is set out above (*supra,* pp. 7-8). In summary, the Commission first concluded that the proposal to allocate Channel 10 conformed to its rules concerning amendments to its table of television assignments and met various distance and other technical requirements designed to prevent interference, etc. (R. 954). The result of these conclusions was only to make the Channel 10 proposal eligible for consideration on its merits. Secondly, the Commission drew several general conclusions to the effect that Channel 10 would bring additional service to a "significant" number of people (R. 954). When the Commission's opinion is analyzed, these two general propositions are all that it really contains.

The Commission's opinion is so vague that it is impossible to ascertain what the "factual and legal basis"[1] for the allocation of Channel 10 was. It cannot be determined from the opinion whether the factual basis was that (1) the Commission was unaware that the channel posed any threat whatever to the UHF stations; or (2) the Commission disagreed with petitioner's showing that UHF service would be destroyed by Channel 10 and concluded that the UHF stations would continue operating as before; or (3) the Commission decided that only one of the three existing UHF stations would cease operation if Channel 10 were allocated, and that one VHF station was better than one UHF; or (4) the Commission concluded that

[1] This quotation is taken from the legislative history, *supra,* p. 19.

the UHF stations were already in such difficulty without Channel 10 that none were likely to survive even if the status quo were retained, and that one reasonably sure VHF station was better than three doubtful UHF stations.

The legal basis for the Commission's action is similarly hidden. Absent is a conclusion in the language of any pertinent Communications Act standard, or even any indication as to which of two or more standards governed this case. This Court has no way to determine whether the Commission based its allocation on Sections 303(g), 307(b) or some other standard.

By upholding the Commission's order, the court below sanctioned administrative laxness which Congress had intended to prevent. If an administrator need say no more in justification for a new rule than that it would serve the interests of a significant number of people, then the requirement of Section 4(b) of the Administrative Procedure Act means very little. Congressional insistence upon the "basis and purpose" of a rule was intended as a safeguard against arbitrary action on the theory that one who must give reasons for his actions is more likely to take reasonable actions. The effect of the decision below is to remove most of the content from this requirement. The decision below is therefore of paramount importance and should be reviewed by this Court.

CONCLUSION

The three questions here presented are all of paramount importance to the administrative exercise of rule-making functions under Section 4 of the Administrative Procedure Act. An issue basic to each of the questions is whether the most rudimentary require-

ments of a fair hearing are applicable to a Section 4 rule-making proceeding. This issue has never been decided by this Court.

The court below found this case to be of sufficient importance to justify *en banc* consideration which it ordered on its own motion. That same importance would seem to justify the granting of certiorari.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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